

NO. 48771-3-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of:

PATRICK TRUXILLO,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

Patrick Truxillo has an extensive history of attempted and completed sexual assaults against adult females. In December 2014, the State initiated civil commitment proceedings against him pursuant to RCW 71.09. The trial court found probable cause and entered an order requiring Truxillo to submit to a current evaluation and a clinical interview by the State's evaluator. During the clinical interview, Truxillo denied ever experiencing arousal to coercion, despite a history of four adjudicated and one non-adjudicated sexual assaults in which the victims reported being choked or beaten. When the State's evaluator requested physiological testing in an effort to verify his offending history and sexual deviance, Truxillo refused to submit to the testing. Correctly interpreting its discretionary authority pursuant to the statute, the trial court found good cause to compel Truxillo to submit to a sexual history and specific issue polygraph test.¹ When Truxillo refused, the trial court found intentional disobedience and found him in contempt of court. As a remedial sanction, the trial court struck his initial commitment trial date and stayed further proceedings until he complied with the prior order of the court. *See* RCW 7.21.030(c).

¹ The State also moved to compel plethysmograph testing however, the trial court reserved ruling on this issue until after completion of the clinical interview and the polygraph testing.

Truxillo only appeals the remedial sanction striking the trial date and staying the proceedings until he purges his contempt. He has not appealed the order finding him in contempt nor the underlying order compelling him to undergo polygraph testing.²

II. ISSUES

- A. **Did the trial court abuse its discretion by staying proceedings as a remedial sanction under RCW 7.21.030(c) for Truxillo's failure to comply with the court's order to submit to polygraph testing?**
- B. **Should the State substantially prevail on review does the Commissioner or Clerk have discretion in awarding costs pursuant to RAP 14.3?**

III. FACTS

Mr. Truxillo was born on August 10, 1967, and is now 49 years old. CP at 415. He has been convicted of a sexually violent offense as that term is defined in RCW 71.09.020(17). CP at 416. On January 12, 2002, he was convicted of Rape in the First Degree and Burglary in the First Degree in Grays Harbor. CP at 416. Rape in the First Degree is by definition, a sexually violent offense. RCW 71.09.020(17).

² Truxillo has not assigned error to the trial court's order compelling him to participate in polygraph testing or the order finding him in contempt. Consequently, he has waived any challenge to the order compelling his submission, and the contempt flowing from his refusal to submit. RAP 10.3(g). *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005) (citing *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003)) (It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.)

In the early morning hours of September 4, 2001, Truxillo forced his way into the apartment of L.W., a 21 year-old female. CP at 416. Once inside the apartment, Truxillo pushed the victim against the wall and covered her screaming mouth with his hand. CP at 416. During the struggle, L.W. bit Truxillo's right hand thumb and index finger. CP at 416. Truxillo told L.W. he was not going to hurt her and then grabbed her by the shoulders and escorted her to the bed. CP at 416. The two began to struggle for control until Truxillo ripped the victim's underwear at which point the victim stopped physically resisting. CP at 416. Despite her multiple requests to stop, Truxillo raped L.W. vaginally for over 35 minutes. CP at 416. While raping her, Truxillo told her "Oh, you're so beautiful", "It feels so good", "I want you, I need you", and "I love you". CP at 416. L.W. indicated he was intoxicated and that she got the impression he felt she was his lover. CP at 416.

At one point, L.W. was allowed to use the bathroom under Truxillo's supervision. CP at 416. While in the bathroom, she pushed the emergency button which buzzed outside of her room in the hallway and has a flashing light to let her neighbors know something is wrong. CP at 416. After she left the bathroom, Truxillo continued to vaginally rape L.W. for 10 minutes until a neighbor came to the door asking if she was okay. CP at 416. Truxillo told L.W. to tell the neighbor she was fine

or he would hit her. CP at 416. The victim told the neighbor she was okay. CP at 416. Truxillo turned off the alarm and then continued to rape the victim for another five minutes until L.W. told him he had to leave because her mother would be coming to her residence at 5:00 a.m. CP at 416. Prior to leaving, Truxillo went through L.W.'s belongings. CP at 416. After smelling a pair of purple satin underwear he stuck them in the pocket of his sweatshirt along with a pair of black elastic underwear. CP at 416.

Mr. Truxillo was arrested later that day, at the Flamingo Hotel in Aberdeen, Washington where he was residing with his maternal grandmother. CP at 417. Upon serving a search warrant, officers discovered a duffle bag containing Truxillo's clothes, seven adult pornographic magazines, one pornographic videotape, two pairs of bikini style underwear later identified as L.W.'s underwear, and an additional pair of unidentified women's underwear. CP at 417. Truxillo had both alcohol and cocaine in his system at the time of the arrest. CP at 416.

Truxillo was ultimately sentenced to 160 months in the Department of Corrections. CP at 417. Shortly before his scheduled release, the State filed a sexually violent predator (SVP) petition pursuant to RCW 71.09 on December 29, 2014. CP at 1. In support of its initial

petition, the State submitted a 22-page psychological evaluation of Truxillo conducted by Dr. Brian Judd, Ph.D. *Id.*; CP at 436-57.

As part of his evaluation, Dr. Judd attempted to meet with Truxillo for a clinical evaluation and interview his therapist Alicia St. John. CP at 449. Truxillo declined the interview and Ms. St. John refused to respond to Dr. Judd's request for an interview. CP at 436; 449. At the time of Dr. Judd's initial evaluation, Dr. Judd had no information on Truxillo's current mental state or potential discharge plans. CP at 449.

On February 20, 2015, the trial court found probable cause and ordered that Truxillo be detained at the Special Commitment Center for further evaluation. CP at 41. Consistent with RCW 71.09.050(1)³, the trial court further ordered Truxillo submit to a current evaluation, which was to include a clinical interview and psychological testing, by an expert chosen by the state. CP at 41-42. Truxillo refused to participate in the clinical interview with Dr. Judd until the court entered a subsequent order on October 7, 2015, compelling his participation. CP at 81.

³ RCW 71.09.050(1) provides, in pertinent part:

The prosecuting agency shall have a right to a current evaluation of the person by experts chosen by the state. The judge may require the person to complete any or all of the following procedures or tests if requested by the evaluator: (a) A clinical interview; (b) psychological testing; (c) plethysmograph testing; and (d) polygraph testing. The judge may order the person to complete any other procedures and tests relevant to the evaluation.

On November 13, 2015, Dr. Judd conducted the clinical interview of Truxillo. CP at 91. Truxillo provided little information and denied either historically or currently experiencing arousal to coercion, despite a history of four adjudicated and one non-adjudicated sexual assaults in which the victims reported being choked or beaten by him. CP at 91-92.

On November 16, 2015, at the request of Dr. Judd, the State moved to compel physiological testing of Truxillo in an effort to verify his offending history and sexual deviance. On December 15, 2015, the court ordered Truxillo to submit to polygraph testing pursuant to RCW 71.09.050(1). Although given multiple opportunities to participate in the testing, Truxillo refused. CP at 285-89. The State moved to hold Truxillo in contempt. CP at 401-03. At the contempt hearing, the trial court heard argument that lesser coercive sanctions would fail as Truxillo was already incarcerated and was indigent. CP at 265; RP at 26-27. On February 11, 2016, the trial court held Truxillo in contempt for his willful disobedience of the court's order, and determined that a stay in the proceedings is the appropriate sanction until he complies with the court's order. CP at 401-03.

IV. ARGUMENT

A. The Trial Court's Order Staying Proceedings Is a Remedial Sanction Designed To Ensure Compliance with the Prior Order Pursuant To RCW 7.21.030(2)(c)

1. Standard of review

The abuse of discretion standard governs review of sanctions for noncompliance with discovery orders. *In re Det. of Young*, 163 Wn.2d 684, 694, 185 P.3d 1180, 1185 (2008) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002)). A discretionary determination should not be disturbed on appeal except on a clear showing that the discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.*

2. The trial court did not abuse its discretion

The very sanction ordered by the trial court here has already been approved by the State Supreme Court as an appropriate sanction in SVP proceedings where the individual refuses to comply with the court's orders. Yet, Truxillo argues that the trial court erred because the contempt order did not expressly find under RCW 7.21.030(d) that the statutory sanctions listed in RCW 7.21.030(2)(a)-(c) were ineffectual to terminate a continuing contempt order. The trial court was not required to expressly

find the statutory sanctions were ineffectual because the court's remedial sanction fits squarely under RCW 7.21.030(2)(c).

RCW 7.21.010(1) defines contempt of court as "disobedience of any lawful judgment, decree, order, or process of the court," and "refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question." An intentional violation of a court's lawful order constitutes contempt of court. RCW 7.21.010(1)(b); *Young*, 163 Wn.2d at 693; *See also Smith v. Whatcom County District Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002).

The appropriate remedy for Truxillo's failure to comply with the trial court's order requiring he participate in polygraph testing is civil contempt. Civil contempt differs from criminal contempt in that it is designed to coerce and not to punish. *Smith*, 147 Wn.2d at 105. The primary purpose of civil contempt proceedings is to "coerce a party to comply with an order or judgment." *Id.* (quoting *State v. Breazeale*, 144 Wn.2d 829, 842, 31 P.3d 1155 (2001)). The statute defines "remedial sanction" as a "sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3).

The court may impose a remedial sanction after notice and hearing. The statute provides for the following remedial, coercive sanctions:

- (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1)(b) through (d).
The imprisonment may extend only so long as it serves a coercive purpose.
- (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
- (c) An order designed to ensure compliance with a prior order of the court.
- (d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

RCW 7.21.030. The trial court's remedial sanction of staying the proceedings to ensure Truxillo complies with the prior order is clearly "designed to ensure compliance" with the court's polygraph order, exactly as contemplated by RCW 7.21.030(c). A contempt order staying proceedings may be considered a remedial sanction designed to ensure compliance with the prior order to submit to an examination. *Young*, 163 Wn.2d at 694 citing RCW 7.21.030(2)(c).

The court ordered Young to submit to a deposition and a mental evaluation, and when he refused, the court stayed Young's trial. *Young*, 163 Wn.2d at 687. The Supreme Court found "no argument here challenging the order staying Young's proceedings is supportable." *Young*, 163 Wn.2d at 694. Likewise, it cannot be said that the trial court here abused its discretion. The *Young* court characterized this very sanction as

the one “most reasonably calculated to coerce compliance and further the proceeding”. *Id.* at 695. The trial court specifically concluded in its order that the remedial sanction complied with RCW 7.21.030(2)(c) when it held that the “appropriate remedy for the Respondent’s disobedience of a lawful court order is remedial sanctions designed to coerce his compliance with the evaluation order.” CP at 410.

Truxillo argues that the Supreme Court’s characterization in *Young* should not control in this case because in *Young* the trial court made the “required findings and the appellant in that case raised no challenge relating to the adequacy of that finding.” Appellant’s Opening Brief at 3. However, the trial court in *Young* did not expressly find under RCW 7.21.030(d) that the statutory sanctions listed in RCW 7.21.030(2)(a)-(c) were ineffectual to terminate a continuing contempt order. *Young*, 163 Wn.2d at 688. Rather, the trial court noted in the written findings of fact that “the court has considered lesser coercive sanctions.” *Young*, 163 Wn.2d at 688. In looking at less coercive sanctions, the trial court in *Young* reasoned that the respondent was already incarcerated, so coercive imprisonment would fail; and Young was indigent, so a progressive fine would likewise fail. *Young*, 163 Wn.2d at 695.

Here, the trial court also weighed lesser coercive sanctions. In both the State's briefing and at the contempt hearing, the State argued that lesser coercive sanctions would not be reasonably calculated to result in Truxillo's compliance. CP at 265; RP at 26-27. Just like *Young*, Truxillo is already incarcerated so coercive imprisonment would fail and just like *Young*, Truxillo is indigent so a progressive fine would likewise fail. CP at 265; RP at 26-27. The court expressly adopted the State's recommendations. RP at 35. The trial court's remedial sanction of staying the proceedings until Truxillo purges his contempt is an appropriately measured sanction designed to ensure compliance with the trial court's order pursuant to RCW 7.21.030(2)(c).

B. If the State Is the Substantially Prevailing Party on Review Reasonable Expenses Shall Be Awarded as Costs Pursuant To RAP 14.3

Truxillo argues the court has discretion to award costs to the State if it is the substantially prevailing party because he is indigent. However, the plain language of the Rules of Appellate Procedure do not allow for discretion to deny an award of costs when the State has substantially prevailed on review.

Under the Rules of Appellate Procedure, the State may simply present a cost bill as provided in RAP 14.4. *State v. Blank*, 131 Wn.2d 230, 251, 930 P.2d 1213 (1997). The State is not obligated to

request an award of costs in its appellate briefs. *See Blank*, 131 Wn.2d at 251, 930 P.2d 1213. The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review unless the appellate court directs otherwise in its decision terminating review. RAP 14.2. Consequently, it appears that a clerk or commissioner has no discretion under the rules to deny an award of costs when the State has substantially prevailed on review. *State v Sinclair*, 192 Wn. App. 380, 386, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016); *State v. Blank*, 131 Wn.2d 230, 251, 930 P.2d 1213 (1997). Should the State prevail on this matter, it is entitled to recover reasonable expenses and costs pursuant to RAP 14.3.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the trial court’s order dated February 11, 2016.

RESPECTFULLY SUBMITTED this 21st day of October, 2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Rose McGillis", is written over the printed name of the Assistant Attorney General.

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NO. 48771-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

PATRICK TRUXILLO,

Appellant.

DECLARATION OF
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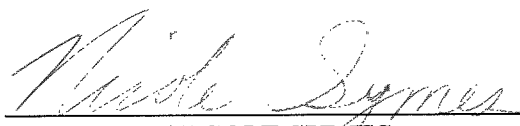
I, Nicole Symes, declare as follows:

On October 21, 2016, I sent via electronic mail a true and correct copy of the Respondent's Opening Brief addressed as follows:

Jodi R. Backlund
backlundmistry@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of October, 2016, at Seattle, Washington.



NICOLE SYMES

WASHINGTON STATE ATTORNEY GENERAL

October 21, 2016 - 3:46 PM

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